Supreme Court No.84132-2

C/A Nos. 27394-6-III
(consolidated with 27395-4-III)

SUPREME COURT
OF THE STATE OF WASHINGTON

In Re the Termination of D.R. and A.R.

CHILDREN'S JOINT REPLY BRIEF (Corrected)

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I. INTRODUCTION

The State now concedes that "due process requires the trial court to determine in each case whether counsel...should be appointed" for children in termination proceedings (TPRs). Resp't Br. 23. The State's proposal to adopt a case-by-case approach would require this Court to disregard: (1) 30 years of jurisprudence finding that counsel is constitutionally required for all children in TPRs; (2) the fact that the vast majority of states have found a case-by-case approach impractical; and (3) this Court's own holding that such an approach is unworkable. The Washington and the United States Constitutions require that children in TPRs, who face perhaps the most severe intrusion upon their family and physical liberty that a state can impose, have an attorney to protect their interests in that proceeding.

II. ARGUMENT

A. A CASE-BY-CASE DETERMINATION OF A CHILD'S RIGHT TO COUNSEL WILL NOT PROTECT ALL CHILDREN

1. This Court and All But a Few States Have Rejected the State's Approach

The State argues that juvenile courts should apply some unspecified criteria in *each* case to decide for which children due process requires appointment of counsel. Resp't Br. 23. Although the State concedes that due process requires counsel for some children in TPRs, and

that counsel was required for the two Children in this case, it doesn't attempt to explain how the situations of A.R. or D.R. differ in any relevant way from any other child facing a TPR. Furthermore, the State's case-by-case approach has been debunked as unworkable by this Court, other state and federal courts, and the vast majority of states.[1]

In *King v. King*, this Court rejected the case-by-case method of determining which litigants have a right to appointed counsel as "unwieldy, time-consuming, and costly." 162 Wn.2d 378, 390 n. 11, 174 P.3d 659 (2007). In *King*, this Court also noted that a case-by-case approach "might itself require appointment of counsel" to determine whether counsel was required. *Id.*

The State relies on *Lassiter* and two dated cases for the proposition that a child's constitutional due process rights are protected by statutes allowing a case-by-case determination. Resp't Br. 21-23 (citing *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 101 S.Ct. 2153, 68 L. Ed 640 (1981); *In the Matter of D.*, 24 Or. App. 601, 610, 547 P.2d 175 (1976); *In the Matter of M.D.Y.R.*, 177 Mont. 521, 536, 582 P.2d 758 (1978)). But, neither *Matter of D.* nor *Matter of M.D.Y.R.* was based on constitutional principles

[1] Nearly 40 states provide a statutory right to counsel for children in dependencies and TPRs. LaShanda Taylor, *A Lawyer for Every Child: Client-Directed Representation in Dependency Cases*, 47 Fam. Ct. Rev. 605, 610-611 (2009).

and both have since been replaced by statutes requiring counsel for all children in dependencies and TPRs.

In *Matter of D.*, the Oregon Court of Appeals interpreted state law to only require a case-by-case approach to determine whether counsel was required in a TPR or adoption proceeding. 24 Or. App. at 610. An Oregon appellate court later explained that *Matter of D.* was not "founded on due process grounds." *In the Matter of Shutts*, 29 Or. App. 121, 125, 563 P.2d 1221 (1977). As with *Matter of D.*, the Montana Supreme Court's 1978 adoption of the approach in *Matter of M.D.Y.R.* preceded much of the development of children's constitutional jurisprudence and characterized the question of a child's right to counsel as a "debate on esoteric constitutional principles of due process and equal protection that in the final analysis do not apply here..." *M.D.Y.R.*, 177 Mont. at 536. The Legislatures in Oregon and Montana ultimately rejected the case-by-case approach to the appointment of counsel as unworkable,[2] and both states are now among the vast majority of states requiring counsel for all children in dependency and TPR proceedings.

[2] In 2003, Oregon passed legislation which grants children the "right to appear with counsel and... to have counsel appointed as otherwise provided by law" in termination proceedings. O.R.S. 419B.875(1)(a)(A) and (2)(b). 2003 Ore. Laws 231. And in 2005, Montana enacted a statute which requires appointment of counsel for all children and youth involved in TPRs. M.C.A. 41-3-425(1)(b).

The State's reliance on *Lassiter* is similarly misplaced. Resp't Br. 21-22. *Lassiter* is not binding nor does it merit great weight given that it neither addressed the issue of counsel for children nor conducted a *Mathews v. Eldridge*[3] due process balancing test utilizing factors unique to children.[4] Moreover, at the time *Lassiter* was decided, North Carolina required appointment of counsel for children in contested TPRs. *Lassiter*, 452 U.S. at 29 (citing N.C. Gen. State. § 7A-289.29 (Supp. 1979)).[5]

2. RCW 13.34.100(6) Does Not Provide for a Case-By-Case Determination of the Right to Counsel

The State admits "there *may* be times when the appointment of a [guardian ad litem] will not be enough to protect a child's rights," but claims RCW 13.34.100(6) suffices as it "authorizes appointment of counsel." Resp't Br. 28. Although the State agrees this is a case in which counsel should have been appointed to both children, it fails to explain how current law prevents future error with any other child, especially as

[3] 424 U.S. 319, 96 S.Ct. 893, 47 L. Ed. 2d 18 (1976).

[4] "The possibility of providing counsel for the *child* at the termination proceeding has not been raised by the parties. That prospect requires consideration of interests different from those presented here, and again might yield a different result with respect to right to counsel."*Lassiter*, 452 U.S. at 43 n. 10 (Blackmun, J. dissenting). *See also Kenny A. ex rel v. Perdue*, 356 F. Supp. 2d 1353, 1360 (N.D. GA 2005) (child's interest in deprivation and TPR proceedings include "safety, health, and well-being, as well as an interest in maintaining the integrity of the family unit and in having a relationship with his or her biological parents.").

[5] Similarly in *In re Welfare of Myricks*, the trial court refused to appoint counsel for the father, but did appoint counsel for the child. 85 Wn.2d 252, 253, 533 P.2d 841 (1975).

the statute does not require courts to conduct a case-by-case analysis, on or off the record,[6] nor does the statute provide any guidelines to courts regarding appointment of counsel.

To review, RCW 13.34.100(6)(f) now allows for the issue of counsel to be *raised* in one of three ways: 1) if a child, 12 or older, requests counsel; 2) if the guardian ad litem (GAL) or Court Appointed Special Advocate (CASA)[7] requests counsel for a child of any age; or 3) if the court, *sua sponte*, raises the issue.[8] The statute does not provide that parents or others may request counsel and nothing in the statute, even as amended, requires the issue to be raised on behalf of any child. Appointment remains entirely discretionary.

This case illustrates how the current statute fails to ensure appointment of counsel for any child. Here, neither the judge nor the CASA requested counsel for either child during the dependency or TPR.[9]

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[6] Even Montana's former statute required that the grounds for denial be stated on the record for judicial review. *See In the Matter of M.D.Y.R.*, 177 Mont. at 533.

[7] This is assuming there is a GAL. The statute, in violation of federal law, renders appointment of a GAL discretionary. RCW 13.34.100(1) (courts shall appoint a GAL, "unless a court for good cause finds the appointment unnecessary"). Child Abuse Prevention and Treatment Act § 106(b)(2)(A)(xiii), as amended, 42 U.S.C. § 5106(b)(2)(A)(xiii) (requiring the appointment of a GAL in every case)).

[8] Due to a legislative change this year, the statute also now requires that all children, 12 and older, be notified of their right *to request* counsel. Laws of 2010, ch. 180, § 2 (HB 2735). *See* Appendix I.

[9] As this case highlights, requiring a CASA/GAL to raise the issue provides little protection. Here, not only did the CASA "not understand what an attorney could do for a

In A.R.'s case, the issue of counsel was *never* raised in the proceedings below, despite a clear need as conceded by the State. Mot. to Reverse and Remand 2-3; *In re Dependency of D.R. and A.R.*, No. 27394-6-III consolidated with No. 27395-4-III (July 1, 2009). As for D.R., who turned 12 during the TPR, the issue was not raised by the CASA or the judge, but instead by D.R.'s mother.[10] RP 165. Counsel for the Children were appointed only on appeal—a costly and time-consuming process largely inaccessible to other children without trial counsel.

B. THE *MATHEWS* DUE PROCESS ANALYSIS REQUIRES APPOINTMENT OF COUNSEL IN TPR PROCEEDINGS

1. The State Minimizes Children's Fundamental and Physical Liberty Interests at Stake in TPRs

a. *Children's Fundamental Interests in Family Integrity are Implicated in TPRs*

The State does not deny that this Court has held that where either fundamental liberty or physical liberty interests are at risk, the right to

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child like D.R.," her position was adverse to D.R., who opposed termination. RP 418-19, 489-90.

[10] Of particular concern here is not only that the trial judge was opposed to appointment of counsel during the TPR, but that she also failed to recognize the Children's need for counsel during the dependency, particularly where the Children's special needs were high and one child was committed to a psychiatric facility with little to no judicial process.

counsel exists.[11] The State also "agrees that children have an important interest in seeing that the parent and child relationship is not terminated without due process protections." Resp't Br. 30. Yet, the State maintains children's interest in this relationship, though "important," is entitled to less weight than their parents' interest. *Id.* This position contradicts a long history of case law holding that a child's liberty interest in the parent-child relationship is, at a minimum, concomitant with that of parents.[12]

To support its assertion that children possess lesser rights than their parents, the State relies solely on *Bellotti v. Baird*, an abortion notification case. 443 U.S. 622, 634, 99 S.Ct. 3035, 61 L. Ed.2d 797 (1979) (holding that a statute requiring parental consent prior to minor's abortion was unconstitutional). In *Bellotti*, the Court specifically found that "children

[11] Children's Opening Br. 9 (citing *In re Grove*, 127 Wn.2d 221, 237, 897 P.2d 1252 (1995)) (counsel must be appointed in civil cases "where a fundamental liberty interest, similar to the parent-child relationship, is at risk").

[12] For a discussion of why children's interests are arguably greater than parents, *see* Children's Opening Br. 19-20; *see also Smith v. Fontana,* 818 F.2d 1411, 1416 (9th Cir. 1987), *cert. denied* 484 U.S. 935 (1987) (overruled on other grounds) (distinction between parent-child and child-parent relationships does not justify constitutional protection for one and not the other); *Wooley v. City of Baton Rouge*, 211 F.3d 913, 923 (5th Cir. 2000) (citations omitted) (interest in family integrity reciprocal and belongs to children as much as to parents); *Franz v. U.S.*, 707 F.2d 582 (D.C. Cir. 1983) (recognizing reciprocal constitutional rights of parent and child to maintenance of family bonds); *Kenny A.*, 356 F. Supp.2d at 1360 (children have fundamental interest in family integrity); *Amanda C. v. Case*, 275 Neb. 757, 766, 749 N.W. 2d 429 (2008) (both parents and children have cognizable substantive due process rights to parent-child relationship); *Johnson v. Hunter*, 447 N.W. 2d 871, 876 (Minn. 1989) (establishment and continuance of parent-child relationship "is the most fundamental right a child possesses" equal to interests in personal liberty and the most basic constitutional rights); *Espinoza v. O'Dell*, 633 P.2d 455 (Colo. 1981) (recognizing a liberty interest in the mutual relationship between child and parent).

generally are protected by the same constitutional guarantees against governmental deprivations as are adults," and that, in regard to "constitutional protection against deprivations of liberty [...] interests by the State," the child's right is "virtually coextensive with that of an adult." *Id.* at 634. As the Court explained, while the State may adjust the legal system to account for children's unique situation and may limit their freedom to make unilateral decisions that may have severe consequences, it may not impinge upon a child's "Fourteenth Amendment guarantee against the deprivation of liberty without due process of law." *Id.*[13]

b. Children's Physical Liberty Interests Are at Stake in TPRs

The State implies that children's physical liberty is not at risk in TPRs because such proceedings "do not determine where a child will be placed." Resp't Br. 32. To the contrary, as the State acknowledges, TPR proceedings decide whether a child will remain in foster care or may return to his/her family. *Id.* at 7. Thus, TPRs determine where a child can or cannot be placed. If parental rights are terminated, a child may never return to his/her biological family. Instead, as in the case of D.R. and A.R.,

[13] *Bellotti* also cited numerous cases upholding children's constitutional rights. 443 U.S. at 634 (citing *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L. Ed. 2d 527 (1967); *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L. Ed. 2d 368 (1970); *Ingraham v. Wright*, 430 U.S. 651, 674, 97 S.Ct. 1401, 1414, 51 L. Ed. 2d 711 (1997); *Breed v. Jones*, 421 U.S. 519, 95 S.Ct. 1779, 44 L. Ed. 2d 346 (1975); *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L. Ed. 2d 725 (1975)).

where there was no hope of a permanent placement, a child becomes a legal orphan subject to years of placement in foster care as well as the threat of institutionalization,[14] placement in group care, and/or detention through contempt for violating a TPR placement order.[15]

The State also argues that children's substantive due process rights "to be free from unreasonable risk of harm" are not implicated in TPRs. Resp't Br. 33 ("*Braam* has nothing to do with the termination of parental rights...."). As the Children argue in section D below, these rights, which implicate their physical safety, are not suspended solely because the State initiates proceedings to permanently remove them from their parents.

The Supreme Court long ago rejected the proposition that children have a right "not to liberty, but to custody," as well as the argument that being in state custody rather than with their parents is of no "constitutional

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[14] In this case, the State conceded that A.R.'s physical liberty was implicated when he was placed in an in-patient mental health treatment facility and that an attorney was needed to protect his liberty interests. Mot. to Reverse and Remand 3.

[15] Relying on *Schall v. Martin*, the State argues that children do "not have a liberty interest in avoiding foster care." Resp't Br. 32 (quoting *Schall v. Martin*, 467 U.S. 253, 104 S.Ct. 2403, 81 L. Ed. 2d 207 (1984)) (upholding the constitutionality of brief, pretrial, preventative detention of juveniles in criminal proceedings). This reliance is misplaced. In fact, *Schall* held that children's interest in freedom from institutional restraints is "undoubtedly substantial." 467 U.S. at 263. After weighing the competing interests and considering the due process protections in place to prevent erroneous deprivation, the Court held that a brief spell of confinement—no more than 17 days—in a controlled environment was constitutional. *Id.* at 268–71. Unlike the children in *Schall*, who will eventually return home to their parents, children in TPRs face a risk of permanent deprivation and, further, have been accused of no wrong-doing and do not present a safety risk to the public.

consequence." *In re Gault*, 387 U.S. 1, 17, 27, 87 S.Ct. 1428, 18 L. Ed. 247 (1967).[16] Few proceedings have a greater impact on a child's physical liberty than TPRs.

2. Current Procedural Safeguards in TPRs Fail to Reduce the Risk of Erroneous Deprivation of Children's Liberty Interests

a. The Current TPR Process Poses Significant Risks of Error

The State argues the TPR process provides ample protection and involves little risk of error. The State's argument is unsupported by case law—the United States Supreme Court, this Court, and many others have long found a high risk of procedural error in the TPR process.[17]

b. Lay GALs/Volunteer CASAs, the State, and Parents' Attorneys Cannot Adequately Reduce the Risk of Erroneous Deprivation

In its Motion to Reverse and Remand below, the State conceded that both D.R. and A.R. had significant legal interests at stake in the TPR, interests they were unable to protect without counsel. Mot. to Reverse and

[16] Although *Gault* dealt specifically with delinquency, a federal court found that "[m]uch the same reasoning applies to a neglect determination proceeding." *Roe v. Conn*, 417 F. Supp. 769, 780 (M.D. Ala. 1976). *See also Braam v. State*, 150 Wn.2d 689, 698, 81 P.3d 851 (2003) (citing *Taylor ex. rel. Walker v. Ledbetter*, 818 F.2d 791, 795 (11th Cir. 1987)) (foster children are "involuntarily placed . . . in a custodial environment, and . . . unable to seek alternate living arrangements.").

[17] *See* Children's Opening Br. 24 (citing *Santosky v. Kramer*, 455 U.S. 745, 762, 102 S.Ct. 1388, 71 L. Ed. 2d 599 (1982)). Washington appellate courts regularly reverse TPRs. *See, e.g., In re the Welfare of C.S.*, 168 Wn.2d 51, 225 P.3d 953 (2010); *In re the Dependency of B.R.*, 239 P.3d 1120 (2010); *In re the Interest of S.G.*, 140 Wn. App. 461, 166 P.3d 802 (2007); *In re the Dependency of G.A.R.*, 137 Wn. App. 1, 150 P.3d 643 (2007); *In re the Welfare of C.B.*, 134 Wn. App. 942, 143 P.3d 846 (2006); *In re the Dependency of T.L.G.*, 126 Wn. App. 181, 108 P.3d 156 (2005).

Remand 2, 3. The State explicitly asserts that neither the CASA nor any other party was capable of providing adequate representation.[18] Again, the State makes no attempt to explain how D.R. or A.R. or their situations differ in any relevant way from any other child facing a TPR.

The State admits the Children had legal interests in addition to the "best interest" involved in TPRs, interests the CASA/GAL failed to comprehend because, in the State's own words, "the GAL did not profess that she had the ability to advocate for [D.R.'s] legal position ... The result was that the child's legal position was not advocated." Mot. to Reverse and Remand 1-3. As to A.R., the State admitted that, despite the presence of a GAL, he "was not able to adequately present a legal argument to the court opposing termination *because he did not have counsel*." *Id.* (emphasis added). Yet, the State fails to explain why a lay GAL would protect other children when it could not here.

The State simply relies on this Court's decision in *State v. Santos,* a paternity proceeding, to support its contention that appointment of a GAL satisfies due process. Resp't Br. 31 (citing *State v. Santos*, 104 Wn.2d 142, 702 P.2d 1179 (1985)). Paternity determinations are nothing

[18] The Washington Legislature has unanimously recognized that attorneys have "different skills and obligations" than GALs, and that attorneys are uniquely situated to protect children's legal rights and interests. Laws of 2010, ch. 180, § 1 (HB 2735).

like TPRs—they do not seek to *extinguish* family relations, but merely to establish financial responsibility.[19] RCW 74.20.010; *Santos,* 104 Wn.2d at 149 ("primary purpose of the State's proceeding is to determine who will support the child").

Relying on a footnote, the State also incorrectly asserts that *In re Welfare of Luscier* held the interest of children in TPRs "could be satisfied with the appointment of a [GAL]." Resp't Br. 44 (citing *Luscier*, 84 Wn.2d 135, 139 n. 1, 524 P.2d 841 (1975)). The sole issue before the Court in *Luscier* was whether parents have a constitutional right to counsel and "no issue [was] raised . . . regarding the representation of the children." 84 Wn.2d at 139 n. 1. The *Luscier* footnote, while dicta, cites to cases which involved *attorney* GALs and which support appointment of counsel. *In re Quesnell* involved a civil commitment proceeding wherein patients, regardless of age, have a right to an attorney and appointment of a best interests GAL is discretionary. 83 Wn.2d 224, 234, 517 P.2d 568 (1973). The footnote also cites *In re Lewis*, 51 Wn.2d 193, 316 P.2d 907 (1957), a delinquency action under former RCW 13.04.010 *et seq*. Prior to

[19] Paternity cases do not involve the state taking either temporary or permanent custody of children. Unlike TPRs, they are not "punitive" proceedings which leave the parent and child with "no right to visit or communicate," or participate in important decisions "affecting the child's religious, educational, emotional, or physical development," and do not place these decisions in the hands of third-parties or the state. *See Lassiter*, 452 U.S. at 39 (Burger, C.J., concurring). Nor do they require a judge to weigh myriad factors to determine whether termination is in a child's best interests.

Gault, such proceedings allowed appointment of probation officers to represent children's legal interests as well as appointment of a lay GAL. *Lewis*, 51 Wn.2d at 197. After *Gault*, which held appointment of counsel a necessity in such proceedings, Washington repealed its delinquency statute and now mandates independent counsel for children in similar proceedings.[20]

Not only do GALs fail to reduce the risk of error in TPRs, the risk of error is not mitigated by the appearance of the State or a parent's attorney. The State has pecuniary, institutional, and programmatic needs that may conflict with the specific needs of a child. *See Kenny A. ex rel v. Perdue*, 356 F. Supp. 2d 1353, 1359 n. 6 (N.D. GA 2005). Likewise, parents' interests diverge from their children's when a dependency order is entered. *Id.* at 1358; *see also Roe v. Conn*, 417 F. Supp. 769, 780 n. 14 (D.C. Ala. 1976) (rejecting contention that state or parents adequately represent children in deprivation proceedings). Without counsel of their own, children bear the risk of erroneous decisions.[21]

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[20] *Gault*, 387 U.S. at 36-37; RCW 13.34.04 *et seq.*, repealed 1977, Ex.Sess., ch. 291 § 81, eff. July 1, 1978; RCW 13.40.140; JuCR 5A.3(1), 6.2, 9.1.

[21] *See also, Matter of T.M.H.*, 613 P.2d 468, 470-71 (Okla. 1980) (state, as initiator of petition, has inherent conflict with child); *In re Matter of Jamie T.T.*, 191 A.D.2d 132 (Ct. of App. NY 1993) (child has right to counsel in abuse and neglect proceedings due to adversarial nature of proceedings); *Santosky*, 455 U.S. at 761 (parents' interests diverge from their children's when a dependency order is entered).

c. *The State's Assertion that Attorneys for Children Would Increase the Risk of Error is Misguided*

In arguing that attorneys for children may increase the risk of error, the State, at 36, relies on Martin Guggenheim's statement that providing children with lawyers "make[s] it less likely, not more likely, that the 'correct' legal result [will] be reached." Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings*, 29 Loy. U. Chi. L.J. 299, 344 (Winter 1998). The State fails to acknowledge that Guggenheim was referring solely to contested *private custody proceedings*, not TPRs. In fact, Guggenheim actually agrees with the Children that "when children enter the state's care, as, for example, when children become foster children, it plainly makes sense to provide them with an attorney to protect their legal interests while they are state wards." *Id.* at 351 n. 200.

The State's argument that both "stated interest" and "best interest" attorneys may increase the risk of error in TPRs (Resp't Br. 35-37) not only ignores the fact that attorneys in Washington State routinely represent children in various types of cases, including abuse and neglect,[22] but also implies that our courts, while capable of weighing evidence and argument

[22] Attorneys appointed to represent children under RCW 13.34.100 "represent the child's position," while volunteer CASAs, lay GALs, and attorney-GALs provide best interest representation. RCW 13.34.100(6)(f); RCW 13.34.105(1).

presented by the State's and parents' attorneys, are incapable of weighing evidence and argument from a child's attorney, thus "tilting the outcome" toward error. Resp't Br. 36. The State provides no basis for its concern about Washington trial courts' inability to handle such cases.[23]

Citing *Bellotti*,[24] the State also questions our courts' ability to deal with an attorney representing a child who may lack perspective or the ability to "recognize and avoid choices that could be detrimental to them." Resp't Br. 36. [25] However, the State expressed none of these concerns when it conceded that both A.R. (despite his mental health issues which resulted in long-term hospitalization) and D.R. (despite her alleged significant cognitive disability) should be appointed counsel on remand.

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[23] The Children do not ask this Court to determine the parameters of an attorney's relationship with a child client. The Children believe this is an issue which should be resolved through the Rules of Professional Conduct (RPC) rulemaking process or by entities such as the Washington State Bar Association, which already regulate the practice of children's attorneys in other juvenile proceedings (e.g., involuntary commitment, child in need of services, at-risk youth, juvenile offenders, and truancy).

[24] As the Children note above in section B(1)(a), the question presented in *Bellotti* was whether *children* should have unilateral decision-making power in obtaining an abortion—it was not, as it is here, about the appointment of counsel to assist children in legal proceedings where the *state* makes unilateral, long-term decisions about their lives.

[25] An attorney performs various functions, including that of advisor, advocate, negotiator, and evaluator, roles which the State ignores. The RPCs provide guidance on the representation of children and the importance of the opinions of young children, commenting that "children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody." RPC 1.14, Comment 1. The rules also allow attorneys to "take reasonably necessary protective action," when the client is unable to make adequately considered decisions. RPC 1.14(b), Comment 5. This year, the Legislature unanimously reiterated the important role of children's attorneys as counselors. 2010 Wash. Legis. Serv. Ch. 180 (H.B. 2735).

Mot. to Reverse and Remand 1-5. These concerns are unfounded and have been appropriately addressed in the vast majority of states outside of Washington, as well as in other proceedings in our state.[26]

3. The State Fails to Show the Government's Burden Outweighs the Liberty Interests at Stake and the Risk of Erroneous Deprivation

The government's burden associated with the appointment of counsel is minimal. The State's unsupported position that the appointment of counsel for children in TPRs would place a significant financial and administrative burden on the government is incongruent with its concession that "[t]he majority of dependency proceedings filed in this state do not lead to termination of parental rights." Resp't Br. 3.

The State also expresses concern about the lack of attorneys with specialized training to represent children. Resp't Br. 40. This paucity, if true, is unsurprising in the absence of the requirement that children's attorneys be appointed. As to the competence of attorneys that would be appointed if there were a right to counsel, attorneys in Washington are required to provide competent representation. Rules of Professional Conduct (RPCs) 1.1. The RPCs further contemplate that when handling legal problems in unfamiliar areas, attorneys have a duty to seek additional

[26] The State argues that D.R.'s case is a prime example where an attorney may "actually be harmful to a child." Resp't Br. 38-39. The State's argument is nonsensical given that the State itself agreed D.R. needed an attorney. Mot. to Reverse and Remand 2-4.

training, study and/or association with an attorney of established competence in that area. *Id.* and Comments.

Ultimately, the high likelihood that children's fundamental liberty interests will be erroneously deprived in the absence of an attorney far outweighs the State's interest.

C. WASHINGTON COURTS CAN PROVIDE GREATER PROTECTIONS THAN AFFORDED BY FEDERAL LAW

Contrary to the State's claim, Washington courts have in fact construed the state due process clause as more protective than its federal counterpart. In arguing that "the decisions of this Court consistently treat the [state and federal due process] provisions as being equivalent," (Resp't Br. 16), the State ignores *State v. Bartholomew*, 101 Wn.2d 631, 683 P.2d 1079 (1984), where this Court construed article I, section 3 as more protective than its federal counterpart as to admissible evidence in the sentencing phase of a defendant found guilty of a capital crime. Similarly, in *State v. Davis*, 38 Wn. App. 600, 605, 686 P.2d 1143 (1984), the Washington State Court of Appeals, Div. I, rejected federal precedent regarding use of a juvenile's post arrest silence. It is incorrect for the State to say the clauses are always interpreted exactly the same way, and none of the cases the State cites involved the right claimed here.

The State maintains that statutory codification of the *Luscier/Myricks* rule requiring counsel for parents in dependency and TPR proceedings prevents a finding that these and subsequent cases were grounded on state constitutional law. Resp't Br. 41. Because both cases preceded *Lassiter*, this Court relied on cases construing the Fourteenth Amendment simply to establish the fundamental right at issue, not the constitutional protections required in the cases at bar. *Luscier*, 84 Wn.2d at 136-37; *Myricks*, 88 Wn.2d at 253-54. Three years after *Lassiter*, this Court affirmed the state constitutional basis for its holding in *Luscier* by refusing to apply federal law to the withdrawal of parents' counsel on appeal in child deprivation cases. *In re Welfare of Hall*, 99 Wn.2d 842, 846, 664 P.2d 1245 (1983) ("[T]he right to counsel in child deprivation proceedings[], except in limited cases, finds its basis in state law."[27]). The same year, the Court of Appeals stated that parents in TPRs have a right to effective assistance of counsel under the state's due process clause. *In re Mosley*, 34 Wn. App. 179, 183-84, 660 P.2d 315 (1983).[28]

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[27] This Court, in *Hall*, explained that the "limited circumstances" are those where the right is guaranteed solely under federal law. *Id.* (citing *In re Luscier*, 84 Wn.2d at 138).

[28] Similarly, in 1985, the Washington Court of Appeals, Div. III, holding that a father's due process rights were violated when the trial court resolved joint custody issues in chambers, reasoned, "If the constitutional right of a parent to have counsel is mandated under our constitution, how much more important in such proceedings would be the mandating of a requirement that all evidence which the court uses in reaching a decision.

In their opening brief at 38-39, the Children list numerous post-*Lassiter* cases which cite *Luscier*, *Myricks,* and/or the state due process clause for the proposition that parents have a constitutional right to counsel in these proceedings. After 1981, these courts could have relied solely upon *Lassiter* and the federal due process clause when scrutinizing procedural fairness in state dependency and termination hearings, but chose instead to cite *Luscier*, *Myricks*, or article I, section 3.[29]

The State also argues this Court should be guided by outdated and discarded notions regarding individual rights. Resp't Br. 46. While the fourth factor in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), does require courts to "consider the degree of protection Washington State has historically given in similar situations," it is not intended to freeze the interpretation of constitutional principles. *Grant County Fire Prot. Dist. v. City of Moses Lake,* 150 Wn.2d 791, 809, 83 P.2d 419 (2004). "Due process is, perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a

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. . should be in open court." *In re Marriage of Ebbighausen,* 42 Wn. App. 99, 103, 708 P.2d 1220 (1985). *Ebbighausen* too relied on *Luscier* and *Myricks*. *Id.*

[29] *See also K.P.B. v. D.C.A.*, 685 So. 2d 750, 752 (Ala.Civ.App. 1996) (post-*Lassiter* right to counsel ruling by state supreme court must have been based on state constitution).

progressive society." *Griffin v. Illinois*, 351 U.S. 12, 20, 76 S.Ct. 585, 100 L. Ed. 891 (1956) (opinion concurring in judgment).[30]

While the State suggests that this Court should adopt the inferior legal position of children from an earlier era, the U.S. Supreme Court's "prior cases recognizing that children are, generally speaking, constitutionally protected actors require this Court" and any other to reject the notion of children as "chattel" to whom due process does not apply. *Troxel v. Granville*, 530 U.S. 57, 88, 120 S.Ct. 2054, 147 L. Ed. 2d 49 (2000).

D. CHILDREN'S SUBSTANTIVE DUE PROCESS RIGHTS ARE DIRECTLY IMPLICATED IN TPRs

Children in foster care are in the custody of the State which has the authority and duty to manage almost all aspects of their lives. While in the State's care, regardless of whether the State has chosen to file a TPR petition, foster children have a substantive due process right to be free from unreasonable risk of harm. *Braam v. State*, 150 Wn.2d 689, 698, 81 P.3d 851 (2003). A TPR order can commit these children to the State's care from that time forward until the State consents to their adoption or

[30] As such, "constitutional amendment[s] must draw [their] meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S 86, 101-02, 79 S.Ct. 590, 598, 2 L. Ed. 2d 596 (1958).

they age out of the system. As such, it extends this risk of harm into the future, a risk which cannot be deemed *de minimis*.[31]

While the State does not respond to the Children's claim that the failure to appoint counsel in a TPR violates their substantive due process rights, it appears to misunderstand the reach of the substantive due process protections unanimously set forth in *Braam*. Resp't Br. 33 ("*Braam* has nothing to do with the termination of parental rights, and a dependant [sic] child may be in the foster care system regardless of whether parental rights are terminated."). In *Braam*, this Court held that "foster children possess substantive due process rights that the State, in its exercise of executive authority, is bound to respect," and, more specifically, "foster children have a substantive due process right to be free from unreasonable risk of harm, including a risk flowing from the lack of basic services, and a right to reasonable safety." *Braam*, 150 Wn.2d at 698-99. Each child involved in a TPR proceeding is a dependent "foster child"; thus, every child possesses these rights during the time that a proceeding under RCW Chapter 13.34, including a TPR, is pending.

[31] In fact, where no adoption is imminent, as was the case here, the State may not be helping children by making them legal orphans. *See* Laws of 2009, ch. 235, § 1 (HB 1961) (Longitudinal research indicates disproportionate likelihood that children aging out of foster care will experience lower economic security, higher risks of incarceration, higher rates of untreated mental illness and behavioral problems, and early parenthood with child welfare involvement.).

The State's argument that children's substantive due process rights are somehow suspended when there is a TPR proceeding is unsupported by the State and has no basis in law. Ultimately, the State has failed to address or rebut the Children's claim that children's substantive due process rights can only be protected by the provision of counsel.

E. AS THE STATE CONCEDES, DEPENDENCY PROCEEDINGS AND TPRs ARE INEXTRICABLY LINKED

The State asks this Court to ignore the Children's arguments about "how the [foster care] system ill-served D.R. and A.R." and "the potential value of counsel in dependency proceedings." Resp't Br. 19. In their opening brief, the Children highlight dependent children's liberty interests at stake in TPRs, a process which inherently involves examining the events that occurred and services provided during the dependency that led the State to file a TPR petition.[32] As the State admits, "dependency is a prerequisite of termination," (Resp't Br. 2)—it is necessary to understand how actions taken by the parties in dependencies impact TPRs.[33]

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[32] The State highlights the connection between dependencies and TPRs when it discusses what the TPR petition must allege, including that "the services ordered under RCW 13.34.136 have been expressly and understandably offered and provided." Resp't Br. 6 (citing RCW 13.34.180).

[33] In fact, the State devotes much its brief to an explanation of the connection between the dependencies and TPRs. Resp't Br. 2-9. And, to explain the government's interest in TPRs, the State cites *In re Dependency of Schermer*, 161 Wn.2d 927, 169 P.3d 452 (2007), a case only involving dependency proceedings. Resp't Br. 38.

The State has admitted that TPRs do not exist in a vacuum—it conceded that A.R. and D.R. needed counsel *in the TPR,* not only because of the risk to their relationship with their mother, but due to events that happened to them during the course of the dependency. Mot. to Reverse and Remand 2-3. Specifically, the State acknowledged that A.R.'s "significant" legal interests included those "related to his in-patient mental health treatment and designation and treatment as a sexually aggressive youth..." *Id.* And, ultimately, the State's failure to provide adequate services to the Children *in the dependency* was directly related to whether, by the time of the TPR trial, their mother could meet their high needs. CP 90-91; RP 771, 778-82. *See also* Br. of Resp't A.R. 4-9, *In Re: Dependency of D.R. & A.R.*, No. 273946-III (June 5, 2009). As the State conceded, without counsel, the Children were "not able to adequately present a legal argument" relating to these issues, issues relevant to whether the State had met its burden to terminate parental rights under RCW 13.34.180. Mot. to Reverse and Remand 3.[34]

While the Court has limited its review to whether children in TPRs have a constitutional right to counsel, the TPR proceeding cannot be fully

[34] The recommendations of the Children's neuropsychologist were not followed during the dependency. Children's Opening Br. 4-5; CP 31-44; Sup. CP Ex. 18, CP 38-41. As a result, the Children's well-being deteriorated and their needs increased making it even harder for their mother to meet their needs prior to the TPR. RP 53-54, 266, 307, 310, 329, 552, CP 48.

extricated from the dependency proceeding for, as the State notes, "the dependency continues in parallel with the termination proceeding, and continues after the termination proceeding ends, regardless of the outcome." Resp't Br. 3.

F. THIS COURT APPROPRIATELY GRANTED REVIEW

The question raised by the State as to the Court's decision to grant review (Resp't Br. 17-18) was extensively briefed in this Court and below,[35] and was argued telephonically before a Supreme Court Commissioner on April 1, 2010. *Supreme Court Clerk's Letter* (March 11, 2010). Department I referred it to an *en banc* review and then it was re-referred to Department I, whose five Justices unanimously granted review, narrowing the issue. *Order on Motions* (April 27, 2010); *Order on Motions* (May 7, 2010). The State did not request *en banc* review at that juncture or in the more than four months between when this Court clarified its order narrowing the scope of review and the State's filing of its response brief. *Order on Motions* (June 2, 2010). The issue has been appropriately and conclusively decided.

[35] The Children incorporate by reference their argument on these issues before this Court and the Court of Appeals.

III. SUMMARY

As every court has found in the past 30 years, because of the fundamental family and physical liberty interests at stake in TPRs, appointment of counsel to all children is constitutionally required. The Children in this case, A.R. and D.R., were denied attorneys under RCW 13.34.100. The State conceded that A.R. and D.R. needed attorneys to protect their legal interests. Without distinguishing these Children from other children in TPRs, the State argues that RCW 13.34.100 will somehow protect other children despite its failure here. In addition to being unsupported, illogical and outdated, the State's argument in favor of a case-by-case approach flies in the face of this Court's own admonitions about such an approach as well as the approach taken by the vast majority of states. The Children ask this Court to hold that all children in TPRs have the constitutional right to the protection of an attorney. The Children also renew their request for attorney's fees and costs on appeal as allowed by law.

Respectfully submitted this 24th day of November, 2010,

/s/

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On November 24, 2010, our office filed a Children's Joint Reply Brief with errors in the Table of Authorities due to a glitch in Microsoft Word. Attached please find a corrected copy of the Table of Authorities to replace the incorrect one in the original brief.

Additionally, for your convenience I have included a complete corrected copy of the brief.

If you have any questions, please feel free to contact our office.

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